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No.

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

CHARLES TRIMARCHE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL S. WASHOR
A Member of the Bar of the
United States Supreme Court
299 Broadway
New York, N.Y. 10007
Tel. (212) 732-2077

WASHOR & WASHOR
Attorneys for Petitioner

DICK BAILEY PRINTERS, 290 RICHMOND AVE., S.I., N.Y. 10302
TELEPHONES: (212) 447-5358 — (516) 222-2470

A

QUESTIONS INVOLVED

1. Was the petitioner's Constitutional right to Due Process violated when the Government breached its obligation, as part of a plea bargain, to provide a statement to the Court at the time of sentencing, on behalf of the petitioner, in return for his cooperative efforts?

2. Was the petitioner's constitutional rights to Due Process and to a speedy trial violated as a result of the unreasonable and inordinate delay of one year between his plea of guilty and sentencing?

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CHARLES TRIMARCHE,

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, CHARLES TRIMARCHE, respectfully requests that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit, entered on September 2, 1980, affirming a judgment of the District Court for the Eastern District of New York entered on April 1, 1980, convicting petitioner after a plea of guilty to the crime of possession of a United States Treasury check that was stolen from the United States Mails, in violation of Title 18 U.S.C. Section 1708.

As a consequence of this conviction, the petitioner was sentenced to a term of four and one-half years imprisonment; in addition, the Court imposed a monetary fine in the sum of $2000.00.

OPINION BELOW

The United States Court of Appeals for the Second Circuit affirmed the judgment of conviction without formal written

opinion; however, an unpublished and restricted written opinion is annexed hereto as part of Appendix "B".

JURISDICTION

The Order of the United States Court of Appeals for the Second Circuit was rendered on September 2, 1980.

The jurisdiction of this Court is invoked, made and conferred under 28 U.S.C. 1254(1) and under Rule 19(1) of the Rules of the Supreme Court.

RULES OF THE SUPREME COURT

Rule 19, Considerations Governing Review on Certiorari.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been but should be, settled by this court; *or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.*

STATEMENT OF THE CASE

On February 2, 1979, CHARLES TRIMARCHE was interviewed by the United States Postal Inspectors and the United States Secret Service agents. During the course of this interview, he implicated himself and one JOHN COSARES in the forgery of three stolen United States Treasury checks. On February 9, 1979, petitioner was arrested for violation of Title 18 U.S.C. Section 495 (forging and uttering a United States Treasury check). The petitioner was further debriefed by the Secret Service and Postal Inspectors agencies. Both law enforcement agencies presented the results of the investigation to the United States Attorney's office for the Eastern District of New York for prosecutorial consideration.

Based upon Trimarche's statements to the law enforcement agencies and the United States Attorney's office for the Eastern District of New York, the Government obtained an arrest warrant for John Cosares, the person Trimarche claimed was the source of the stolen checks.

On March 28, 1979, an information was filed against the petitioner, charging the petitioner with violation of Title 18 U.S.C. Section 1708, possession of a stolen U.S. Treasury check.

On April 6, 1979, the petitioner interposed a plea of guilty to the information; at the time, the Government and petitioner entered into a plea agreement. In accordance with the terms of the agreement, Trimarche waived indictment and pleaded guilty to a one-count information. In consideration for the petitioner's guilty plea, the Government agreed and promised that said plea would be in full satisfaction of all federal charges which could be brought against petitioner in the Eastern District of New York for his involvement with the three stolen United States Treasury checks. Petitioner further agreed to cooperate fully with any and all federal law enforcement agencies and the

United States Attorney's office in the prosecution of John Cosares. In return for this pledge, the United States Attorney's office agreed and promised to specifically detail and demonstrate the extent of petitioner's cooperation to the sentencing court.

On May 18, 1979, a probation and pre-sentence report was prepared; the report reflected the petitioner's intention to cooperate with law enforcement and reflected the conditions of the plea agreement between the petitioner and the United States Attorney's office. Further, the report made reference to the Government's obligation to provide a statement on behalf of the petitioner to the sentencing court detailing his cooperative efforts during the course of the investigation.

From May 18, 1979 to April 1, 1980, petitioner cooperated fully with the Government. He appeared approximately eight times in court prepared to be sentenced; the sentence was adjourned continually awaiting the completion of the petitioner's cooperative efforts. As a basis for the requested adjournments the Government sparsely alluded to the petitioner's cooperative efforts. The case of the related defendant, Cosares, was also pending before the very same court.

On March 31, 1980, petitioner notified the Government that he was not desirous of testifying at the trial against Cosares, advising the authorities that threatening phone calls had been received at his home. The petitioner became recalcitrant as a result of fear for his own safety and the safety and well-being of his family. Nonetheless, Cosares eventually interposed a plea of guilty to his indictment based upon the evidence and statements supplied by the petitioner to the Government and was himself sentenced to three years in jail.

On March 31, 1980, when the Government learned of the threatening phone calls to the petitioner and his fear of testifying at a public trial against Cosares, the Government brought the petitioner before the court for an admonishment of his

rights.[1]

Previously, on March 28, 1980, when the petitioner appeared before the court, sentence was adjourned to April 11, 1980. Notwithstanding the scheduled sentence date of April 11, 1980, on March 31, 1980, the court, learning for the first time of the petitioner's fear of testifying publically, advanced the sentence to April 1, 1980.

On April 1, 1980, when the petitioner was finally sentenced, the Government reneged on its promise and agreement to provide a detailed account of the petitioner's cooperative efforts.

The Government at the time of sentencing stood mute.

The initial plea bargain entered into on April 6, 1979 and accepted by the court did not create any implicit or explicit requirement that the petitioner testify at any trial against Cosares as a condition precedent to the Government's detailing a statement of cooperation on behalf of the petitioner.

Prior to sentence, petitioner made full restitution with regard to the United States Treasury checks.

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1. Pertinent portion of minutes:

"MR. ROSE: I think before, can I just ask your Honor to instruct Mr. Trimarche that he has no fifth amendment right. He pleaded guilty and when he pleaded guilty and when he testified before the Grand Jury and when he made the statement to the agents being advised of his rights—

THE COURT: Once you have testified as to any event in question you have waived — I suppose if he refuses to answer questions he runs the risk of contempt and conviction on top of a regular sentence. It's your choice.

MR. ROSE: Thank you, your Honor.

THE COURT: I will see you tomorrow morning.'

(Transcript of minutes, March 31, 1980, pages 5 and 6.)

PERTINENT FACTS DEMONSTRATING THAT THE GOVERNMENT BREACHED ITS AGREEMENT WITH THE PETITIONER AND FAILED TO INFORM THE COURT AT THE TIME OF SENTENCE WITH A DETAILED ACCOUNT OF THE PETITIONER'S COOPERATIVE EFFORTS DURING THE COURSE OF THE INVESTIGATION.

(1) On April 6, 1979, the Government agreed and promised to render a detailed statement of petitioner's cooperation to the sentencing court.

(2) on April 1, 1980, at the time of sentence, the Government remained mute.

(3) The extent of petitioner's cooperative efforts that was not brought to the court's attention by the Government at the time of sentence was as follows:

(a) On February 2, 1979, petitioner was interviewed and debriefed by the United States Postal Inspectors and the United States Secret Service agents.

(b) On February 9, 1979, at the time of the arrest of the petitioner, he was debriefed by the United States Attorney's office.

(c) On July 18, 1979, petitioner, again, was debriefed by the United States Attorney's office.

(d) On July 18, 1979, petitioner testified in the Grand Jury at the bequest of the United States Attorney's office.

(e) As a result of petitoner's testimony before the Grand Jury, an indictment was found against John Cosares.

(f) On March 25, 1980 and March 27, 1980, petitioner was again debriefed by the United States Attorney's office in preparation of the forthcoming trial against John Cosares.

REASONS FOR GRANTING THE WRIT

POINT I

THE PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE GOVERNMENT BREACHED ITS OBLIGATION, AS PART OF A PLEA BARGAIN, TO PROVIDE A DETAILED STATEMENT TO THE SENTENCING COURT, ON BEHALF OF THE PETITIONER IN RETURN FOR HIS COOPERATION.

This Court, in *Santobello v. New York* (404 U.S. 257), held that when a prosecutor reneges on a promise which assisted in inducing a plea by an accused, then the subsequent plea and sentence is invalid. At page 262, this Court stated:

> "This phase of the process of criminal justice (plea bargaining) and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."

An unkept bargain which has induced a guilty plea is grounds for relief since it renders the plea involuntary. Consequently, if an accused's guilty plea is not equally voluntary and knowingly made, it has been obtained in violation of due process and therefore void. (*McCarthy v. U.S.*, 394 U.S. 459). *A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void and subject to collateral attack (Machibroda v. U.S.*, 368 U.S. 487; see also *Walker v. Johnston,* 312 U.S. 275; *Waley v. Johnston,* 316 U.S. 101; *U.S. v. Paglia,* 190 F.2d 445, CA 2). This postulate of law was reiterated in *U.S. v. Malcolm* (432 F.2d 809). The *Malcolm* court held that the Appellate Courts have the inherent power to

review a claim that a sentence is the product of procedures inconsistent with due process of law. The issues to be addressed are whether the sentencing process conformed with "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (*Gideon v. Wainwright,* 372 U.S. 335) and whether it was infected with fundamental defects resulting in a miscarriage of justice; also whether it was consistent with rudimentary demands of fair procedures (*Mill v. U.S.,* 368 U.S. 428).

In *U.S. v. Carter* (454 F.2d 426, CA 4), the Court held that the Government should be obliged to abide by terms of a promise made to an accused that in return for his cooperation in apprehending and convicting other defendants, he would not be prosecuted elsewhere for any crime arising out of this particular transaction. At page 427, the Court stated:

> "We conclude that if the promise was made to defendant as alleged and defendant relied upon it in incriminating himself and others, the Government should be held to abide by its terms."

In *U.S. v. Paiva* (294 F.Supp. 742, D.D.C.), it was stated that if it appears that the defendant, to his prejudice, performed his part of an agreement while the Government failed to do so, the indictment may be dismissed.

In *Walters v. Marris* (460 F.2d 988, CA 4), the Court, citing from *Santobello, infra,* held that an unkept bargain which has induced a guilty plea is grounds for relief from the imposition of sentence. The Court further realized that an examination of the plea minutes alone will not always determine whether the promise has indeed induced the plea.

In the case at bar, the entire record reflects the promises made to the appellant by the Government at the time of the plea, with court approval. At the time of sentence, the *Government* was obliged to detail the petitioner's cooperative efforts.

In *Sheldon v U.S.* (246 F.2d 571, CA 4), *reversed on other*

grounds (356 U.S. 26), the Court reasoned that a plea pursuant to unfulfilled or even unfulfillable promises is invalid. Following the logic of *Shelton, supra,* the court in *U.S. v. Simmons* (537 F.2d 1260, CA 4), stated that where defendants who were charged with bank robbery had entered into a judicially approved plea bargain with the prosecution, wherein the prosecution was to recommend a lesser sentence in return for the defendants' cooperative efforts, the prosecution cannot unilaterally escape their obligation undertaken in the plea bargain by deciding the issue of whether or not the cooperation was even sufficient. The refusal of the prosecution to recommend a lesser sentence was an unfulfilled promise made by the Government and a substantial breach of the plea bargain.

Similarly, in *U.S. v. Hammerman* (528 F.2d 326, CA 4), where the accused, in return for his cooperation, was promised by the Government that the sentencing Court would follow its recommendation, the plea was held to be invalid if the recommendation was not followed by the sentencing judge. The Court found that the prosecutor's promise, though probably made in good faith, was not fulfilled and was, in fact, unfillable since the prosecutor lacked the legal authority to implement the sentence. However, the promise was likely to create belief and reliance by the accused and was, therefore, an essential element of the plea bargain resulting in the entry of the defendant's guilty plea. If a promise is unfulfillable or unfilled, the plea is rendered involuntary.

In the case at bar, in return for the petitioner's cooperation, he was promised that a statement would be made on his behalf detailing his cooperative efforts at the time of sentencing. Subsequently, on the date of sentence, no statement was ever made by the Government in compliance with the plea bargain agreement. In fact, at the time of sentencing, the Government remained mute, notwithstanding an invitation by the defense attorney representing the petitioner to comment on the cooperative efforts or lack of cooperative efforts of the petitioner.

In *Brady v. U.S.* (397 U.S. 742), this Court held that a guilty plea is the product of many factors, and its voluntariness can be determined only by considering all the relevant circumstances. In *Hammerman, supra,* the Court, considering all the relevant circumstances, held that the promise by the Government and the subsequent failure of the Government to fulfill its promise, was enough to warrant invalidation of the plea. Such determination was not affected by the fact that at the time of the araignment, the accused denied any inducement with regard to his plea of guilty.

Likewise, in the instant case, in light of all the relevant circumstances, petitioner was relying upon the Government's representation and promise to inform the court of his cooperative efforts at the time that he was induced to take his plea. The Government cannot unilaterally escape its obligation to the petitioner. The obligation arose initially at the time that the appellant commenced his cooperation. There was no minimum standard of cooperation that was set or agreed upon as a condition precedent to trigger the Government's obligation to inform the Court at sentencing the detail of the petitioner's cooperative efforts.

The Government has argued that the sentencing court was, in fact, informed about the underlying cooperative efforts of the petitioner during the hiatus of one year from the plea of guilt to the date of sentence. It is reasonably suggested that the protracted information given to the court justifying the continued adjournments and the lack of detail specifying the extent of the petitoiner's cooperative efforts does not take the place and stead of having the United States Attorney's office speak on behalf of the petitioner to the court at the time of sentencing.

The issue is not whether the sentencing court had some general information of petitioner's cooperation. By remaining mute at sentencing, the impact of a Government attorney speaking on behalf of the petitioner is totally nullified. The importance of having the Government speak favorably for peti-

tioner, and, in a sense, demonstrate a need for leniency as well as a "quid pro quo" for petitioner's cooperation, cannot be legally measured. A prosecutor's plea for merciful justice has great impact, more so than the usual defense commentary. The petitioner was promised this assistance; The Government unilaterally and without legal justification or explanation reneged.

Whether the Court already knew of the extent of petitioner's cooperation or whether the Court would have placed any value in the Government's statement at the time of sentence is irrelevant. In *Santobello, supra,* the Court went even further when it stated that the fact that the breach of the agreement was inadvertent, was immaterial nor did it lessen the impact of the Government's breach; notwithstanding, the sentencing judge stated he was not influenced by the prosecutor's recommendation of a greater sentence.

When the Government breaches its obligation in a plea bargain, this Court need not look to the impact of that breach on the sentencing Court, since due process mandates that such a breach invalidates the plea. Realistically, the impact of any statement by defense counsel explaining and detailing the cooperative efforts of his client, must be considered minimal as compared to the weight and deference given to an identical or similar statement made by the United States Attorney on behalf of an accused.

In *U.S. v. Bowler* (585 F.2d 851, CA 7), the Government had implicitly promised that it would consider specific mitigating factors and would make a recommendation to the sentencing judge based upon such consideration, all as part of a plea bargain. When the Government failed to present its evaluation of the mitigating factors, the Court held them to be in breach of the terms of the plea bargain and subsequently vacated the sentence. One of the mitigating factors to be considered by the Government was the defendant's cooperation. The Court held that the Government's promise to consider the

defendant's cooperative efforts was an inducement for the defendant's plea of guilty. The Court stated that when a plea rests in any significant degree upon a promise or upon an agreement of the prosecutor so that it can be said to be part of the inducement or considration to a plea, such promise must be fulfilled. At page 854, the Court stated:

> "The Government will not be allowed to avoid the obligation it thus incurred by claiming now that the language literally promises nothing to the defendant. A plea agreement is not an appropriate context for the Government to resort to a rigidly literal approach in the construction of language."

In the case at bar, the petitioner honored his part of the plea bargain. His statements were not merely self-serving; on the contrary, the petitioner offered and made complete restitution; further, during his debriefing, the petitioner revealed facts of a legal impropriety that the Government had absolutely no knowledge of. Petitioner's cooperative efforts led directly to the arrest, indictment and conviction of the target of the underlying investigation. The petitioner spent hours and hours being debriefed both by law enforcement agencies and the United States Attorney's office; petitioner testified at the Grand Jury at the bequest of the Government.

Yet, the Government unilaterally decided that his coopertion was apparently insufficient to trigger the keeping of its promise and agreement to detail his cooperation to the sentencing Court at the time of sentence. The Government's silence at the time of sentence can only be viewed as a breach of the plea bargain. Due process dictates that this Court fashion a suitable remedy to redress the petitioner to serve the ends of the administration of justice.

POINT II

THE PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO A SPEEDY TRIAL WERE VIOLATED AS A RESULT OF THE UNREASONABLE AND INORDINATE DELAY OF ONE YEAR BETWEEN HIS PLEA OF GUILT AND SENTENCE.

It is legion that sentencing is considered part of the criminal trial for constitutional speedy-trial purposes. In *Pollard v. U.S.* (352 U.S. 354), this Court stated at page 361:

> ". . . sentence is part of the trial for purposes of the Sixth Amendment. The time for sentence is of course not at the will of the Judge. Rule 32(a) of the Federal Rules of Criminal Procedure requires the imposition of sentence without unreasonable delay."

In *Barker v. Wingo* (407 U.S. 514), this Court promulgated a balancing test to determine if an accused has been denied his right to a speedy trial; this test necessitates and compels the Court to approach speedy-trial cases on an "ad hoc" basis. The primary onus is on the Court and the prosecutor to assure that criminal cases are brought to trial within a reasonable period of time. The Court then listed four criteria to be employed when evaluating a speedy-trial claim. Parenthetically, the Court stated that none of the criteria is either a necessary or sufficient condition to the finding of a deprivation of an accused's right to a speedy trial.

The four criteria which the Courts should assess in determining whether a particular defendant has been deprived of his right to a speedy trial are: (1) length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant.

Prejudice to an accused cause by a delay bringing him to a speedy trial includes the minimization of any anxiety and any

concern of the accused. Even if an accused is not incarcerated prior to his trial, he is still disadvantaged by restraints upon his liberty and by existing under a cloud of anxiety, suspicion, and often hostile atmosphere. In *Moore v. Arizona* (414 U.S. 25), this Court held that an affirmative demonstration of prejudice to the accused is not necessary to establish a denial of his constitutional right to a speedy trial.

It has also been held that prejudice to an accused caused by a delay need not only be in the eventual severity of an accused's sentence. In *U.S. v. Marion* (404 U.S. 307), the Court stated at page 320:

> "Wholly aside from possible prejudice to a defense on the merit, it may seriously interfere with the defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends."

In *U.S. v. Roberts* (515 F.2d 642, CA 2), it was held that an accused does not waive his right to a speedy trial by merely consenting to a plea bargain. The Court further stated that the Sixth Amendment guarantee of a speedy trial recognizes an accused's significant stake, psychologically, physically and financially, in the prompt termination of a criminal proceeding which may ultimately deprive him of "life, liberty or property." Although the Court recognized that particular delays can occur in sentencing and may well be attributed to the accused's cooperation efforts, the onus is still upon the Court and the prosecution to dispose of the sentence without unreasonable delay. At page 647, the Court stated:

> ". . . we do not mean to fault generally plea bargains in which a defendant's faithful performance of his part of the agreement is made a condition precedent to the prosecution's consent, at the time of pleading, to a reduction in the charges. We do, however, reject any notion that a defen-

dant in effect waives his right to a speedy trial by consenting to such an agreement. Thus, if the Government wishes to bargain for this condition, it may, but it should do so mindful of the risks which it thereby assumes of dismissed indictments for unconstitutional delay."

In the case at bar, the petitioner was prepared to be sentenced in court on eight different occasions. Each time the Court, and the Prosecution, on its own initiative, adjourned the sentence, considering the continuing cooperative efforts.

Based upon the petitioner's cooperation, the principal target of the underlying investigation was eventually convicted; the petitioner, after a year of anxiety, fear, and total cooperation and constant urging to be sentenced, was incarcerated for a term of four and one-half years and fined the sum of $2,000.00.[2] It is a fair assumption that had the petitioner been sentenced within a reasonable period of time as mandated by the United States Constitution and Federal Rules of Criminal Procedure, (32a)(a)(1), his particular sentence would never have been as severe.

In *U.S. v. Carini* (562 F.2d 144, CA 2), the Court held that an accused's cooperation subsequent to his plea does not waive his right to assert a constitutional or statutory speedy trial claim. The facts in *Carini, supra,* parallel closely those in the case at bar, in that the defendant Carini relied upon an unfulfilled prosecutor's promise in allowing his trial to be adjourned for approximately thirty-four months. In holding that Carini's constitutional right to a speedy trial was violated, the Court stated at page 149:

". . . it seems clear to us that the defendant here, though certainly not by an evil intent on the part of the prosecutors, was misled and lulled into not pressing for trial during the sixteen-month period because of his justifiable belief that the prosecution had the authority to offer him the attractive plea bargain it was then proposing, yet, after the offer had been pending for more than a year, the local

2. The sentence imposed was six months short of the maximum sentence allowable.

prosecutor was forced to withdraw it because he had learned that under the Justice Department ground rules he lacked the authority to make such an offer."

The absence of waiver prior to a plea based upon acquiescence to an unfulfilled prosecutorial promise is analogous to similar reliance upon the prosecutor's promise and obligation as part of a plea bargain. The antithesis of the petitioner's contention is recognized in *White v. Henderson* (267 F. Supp. 96, S.D.N.Y.), and *Brady v. Superintendant Anne Arundel County Detention Center* (443 F.2d 1307, CA 4). In *White, supra,* the Court held that an eighteen-month delay between the plea and sentence was reasonable when the resulting sentence imposed was most lenient predicated upon the cooperative effort of the accused. The court reasoned at page 99:

"White has not been prejudiced by the delay. The sentencing State Court Justice made clear that he had imposed a very lenient sentence in recognition of White's time-consuming cooperation. Had sentence not been delayed, White would not have had the opportunity which resulted in his shortened sentence."

In the case at bar, had the sentence not been delayed for a year, but for merely several months, petitioner would have probably received a most lenient sentence considering his open, and full, cooperative efforts leading to an arrest warrant for the primary target of the investigation, and his Grand Jury testimony of July 18, 1979. Instead, the petitioner relied upon an unfulfilled promise and representation and acquiesced to the repeated adjournments, all to his detriment.

In *Brady, supra,* the Court held that where the delay falls between conviction and sentence, and at sentencing the accused receives the minimum punishment that could be imposed, the prejudicial effect of such delay cannot be assumed. This is the true antithesis of the petitioner's circumstance.

In *Juarez-Casares v. U.S.* (496 F.2d 190, CA 5), the Court held that where the Government advanced no valid reason for a delay of two years and seven months in sentencing of an accused and the record demonstrated that the sentencing Judge relied on all events occurring during the delay in determining to impose maximum sentences, the delay in sentencing was held to be unreasonable and prejudicial to the defendant. The prejudice merited vacation of the sentence and release of the accused from custody. The Court found the combination of the judge being influenced by events occurring between conviction and sentence coupled with the imposition of the severe sentence itself, clearly fulfilled the defendant's onus of demonstrating prejudice resulting from the delay.

In the case at bar, the Court was attempting to assist the appellant in the first instance by delaying the sentence in contemplation of his full and complete cooperation. However, at the eventual sentencing, one year later, the Court's mood and attitude was diametrically and diabolically opposed to the altruistic attitude during the one year delay; this in spite of the fact that the petitioner's cooperation directly led to the conviction of the primary target of the investigation, the Court obviously did not consider the cooperative efforts of the accused; nor did the United States Attorney's office at the time of sentencing make the plea for leniency for the petitioner, as promised and agreed upon.

The sentencing Court was obviously ired by the petitioner's refusal to testify in open court at the trial of Cosares, the target of the investigation. On March 31st, 1980, after the Government brought the petitioner before the Court for an admonishment of his rights and informed the Court of the recent recalcitrant attitude of the petitioner predicated upon fear of safety for himself and his family, the Court scheduled the sentence of the petitioner to the following day, April 1st, 1980; the sentence was originally scheduled for April 11th, 1980.

The petitioner was not obligated to testify in open court at the trial of Cosares, as this was not a condition to his plea

bargain. The Court imposed the most severe sentence. All of the cooperative efforts of the appellant were ignored. Had the petitioner been sentenced in a reasonable time period, the sentencing Court could not have relied upon the events which transpired during the interim year period between the plea and the sentence.

In *U.S. v. Campbell* (531 F.2d 1333, CA 5), the Court held that a four year delay between conviction and sentencing was unreasonable. The Court further stated that unreasonable delay in sentencing may constitute a violation of an accused's Sixth Amendment right to a speed trial. Following *Moore, supra,* the Court reasoned that an accused need not necessarily demonstrate affirmatively, prejudice or any of the particular four criteria enumerated in *Barker, supra,* to justify a definitive finding that there has been a denial of a right to a speedy trial. Each case must be viewed within the totality of the circumstances. The Court in *Welsh v. U.S.* (348 F.2d 885, CA 6), further recognized that the Constitutional right to be sentenced without delay is mandatory, but held that the cooperation provided by an accused between the plea and sentence was a reasonable cause for delay when the final result concluded in leniency to the accused. At first reading, *Welsh, supra,* seems to substantiate the antithesis of the petitioner's position. However, *Welsh* is readily distinguishable. In the case at bar, the one year delay in sentencing of the appellant resulted in the petitioner being penalized even more severely and receiving absolutely no "reward" for his cooperative efforts.

In *U.S. v. Tortorello* (391 F.2d 587, CA 2), the Court held that a three year delay between plea and sentencing was not unreasonable when the Government acted diligently and in good faith. Such a characterization is not appropriate in the case at bar where the Government, in fact, totally reneged on a plea bargain promise to issue a detailed statement as to the petitioner's cooperation during the year's hiatus. Thus, the petitioner was prejudiced as distinguished from the accused in *Tortorello.*

Similar reasoning was found in *U.S. v. James* (459 F.2d 443, CA 5), where the delay between conviction and sentence was deemed unreasonable and the Court refused to dismiss the indictment notwithstanding the fact that the defendant suffered no meaningful loss. Between the conviction and the sentence, the accused, James, was sentenced to a six-year jail term on another unrelated Federal charge. The petitioner herein was prejudiced to the extent that the most severe jail sentence was imposed along with the maximum fine as well as suffering the constraint of his liberty for the entire year prior to sentencing.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR A WRIT OF CERTIORARI BE GRANTED.

Respectfully submitted,

MICHAEL S. WASHOR
A Member of the Bar of the
United States Supreme Court

WASHOR & WASHOR, ESQS.
Attorney for Petitioner
on Petition for Certiorari

APPENDIX "A"
CONSTITUTIONAL AMENDMENTS

ART. V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law* nor shall private property be taken for public use, without just compensation.

ART. VI

Rights of the accused.—*In all criminal prosecutions, the accused shall enjoy the right to a speedy* and public *trial,* by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX "B"

UNPUBLISHED WRITTEN OPINION BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

A Term of the United States Court of Appeals, in and for the Second Circuit, held at United States Courthouse in the City of New York, on the 2nd day of September, one thousand nine hundred and eighty.

WILLIAM H. TIMBERS
ELLSWORTH A. VAN GRAAFEILAND
JON O. NEWMAN
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES TRIMARCHE,

Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is *affirmed.*

This appeal is from a judgment of conviction entered in the district court following appellant's plea of guilty to a one count information charging him with possession of a United States Treasury check which had been stolen from the mail in violation of 18 U.S.C. §1708 (1976).

Appellant's first claim is that the government failed to perform according to its plea bargaining agreement to provide the sentencing court with a statement of the nature and scope of appellant's cooperation with the government in its investigation. The record in this case, however, discloses that on three separate occasions the United States Attorney advised the court that appellant had met with and provided information to the government agents, had made restitution, and had testified before the grand jury. The presiding judge on these occasions was the sentencing judge. We therefore hold that the agreement was substantially performed by the government. *X v. United States,* 454 F.2d 255, 260-61 (2 Cir. 1971), *cert. denied,* 406 U.S. 961 (1972).

Appellant's second claim is that the delay between entry of judgment and sentencing violated his Sixth Amendment right to a speedy trial. This claim was not made in the district court, as appellant either requested or acquiesced in each adjournment of sentencing. In view of the criteria set forth in *Barker v. Wingo,* 407 U.S. 514 (1972), as applied to the facts of this case, we hold that this claim is without merit.

Appellant's third claim, regarding the pre-sentence report, is belied by the statements of appellant's counsel at the sentencing proceeding that he and his client had examined the report and found it to be correct. We hold that this claim is without merit.

William H. Timbers
United States Circuit Judge

Ellsworth A. Van Graafeiland
United States Circuit Judge

Jon O. Newman
United States Circuit Judge

APPENDIX "C"

STIPULATION BETWEEN UNITED STATES ATTORNEY FOR THE EASTER DISTRICT OF NEW YORK AND COUNSEL FOR PETITIONER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

CHARLES TRIMARCHE,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

STIPULATION

IT IS HEREBY STIPULATED AND AGREED, for Appeal purposes only, between WASHOR & WASHOR, ESQS., Attorneys for the Appellant, and the UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF NEW YORK, Attorney for Appellee, that:

1. The United States Secret Service Agency and the Postal Inspector's Agency, jointly, were investigating the Appellant, CHARLES TRIMARCHE, and one JOSEPH COSARES.

2. Appellant CHARLES TRIMARCHE was arrested on

February 9, 1979, and charged with violation of Title 18 U.S.C. Section 495.

3. On February 2, 1979, Appellant, CHARLES TRIMARCHE was debriefed by the Secret Service and Postal Inspector's Agencies in the presence of his lawyers, DENNIS PETERSON, MR. TRIMARCHE implicated JOSEPH COSARES in the commission of the crimes charged.

4. Both Agencies then presented the results of the investigation to the United States Attorney's Office for the Eastern District of New York for prosecutorial consideration.

5. The United States Attorney's Office for the Eastern District of New York commenced the prosecution against JOSEPH COSARES. An arrest warrant for JOSEPH COSARES was issued based upon Appellant CHARLES TRIMARCHE's cooperation and statement.

6. The Appellant, CHARLES TRIMARCHE, was debriefed by the United States Attorney's Office on the following dates: July 18th, 1979, March 25, 1980, and March 27, 1980.

7. On July 18th, 1979, the Appellant, CHARLES TRIMARCHE, testified against JOSEPH COSARES in the Grand Jury, at the bequest of the United States Attorney's Office for the Eastern District of New York; JOSEPH COSARES was indicted by the Grand Jury.

Dated: New York, New York
July 7, 1980

WASHOR & WASHOR
MICHAEL WASHOR
Attorneys for Appellant

EDWARD KORMAN, ESQ.
United States Attorney for the
Eastern District of New York
By:
Assistant U.S. Attorney
Charles Rose

APPENDIX "D"

FEDERAL RULES OF CRIMINAL PROCEDURE §32(a)(1).

Rule 32. Sentence and Judgment

(a) Sentence

(1) *Imposition of Sentence. Sentence shall be imposed without unreasonable delay.* Before imposing sentence, the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. *The attorney for the government shall have an equivalent opportunity to speak to the court.*